More Different than Life, Less Different than Death

The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After *Graham v. Florida*

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The Supreme Court has traditionally applied the Eighth Amendment differently to capital and non-capital cases based on the longstanding notion that "death-is-different." In the recent case of Graham v. Florida, *however, the Supreme Court applied its "evolving standards of decency" standard, heretofore reserved for capital cases, to a non-capital case. The Court held that the Eighth Amendment prohibited states from sentencing juvenile offenders to life without parole for non-homicide crimes. This dramatic change led dissenting justices to argue that this decision marked the end of the Court's "death-is-different" jurisprudence.*

This Article argues, however, that the decision does not curtail the significance of death cases. Rather, the decision signals an opportunity to establish a new category of Eighth Amendment review for life-without-parole sentences. While life without parole may not be as "different" from other sentences as the death penalty, it is still "different" enough from other sentences to warrant its own set of heightened standards of Eighth Amendment review.

Part Two of this Article describes the dichotomy between capital and non-capital cases in the Supreme Court's Eighth Amendment jurisprudence and the application of these two lines of cases in Graham v. Florida. *Part Three of the Article explains why life without parole—a sentence to die in prison—is "different" in its own way. Part Four then argues for the application of a new category of standards under the Eighth Amendment in life-without-parole cases and suggests other possible implications of* Graham.

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I. INTRODUCTION

> "[Life without parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[1]

The United States Supreme Court's application of the Eighth Amendment over the past fifty years has clearly divided capital and non-capital cases.[2] This dual approach has rested on the Court's oft-repeated notion that "death-is-different," and, as a result, the severity and irrevocability of the death penalty warrant greater safeguards against error and heightened legal standards.[3]

In the recent case of *Graham v. Florida*,[4] however, the Court appeared, for the first time, to blur the distinction between capital and non-capital cases.[5] In *Graham*, the Court applied its "evolving standards of decency" standard, heretofore reserved for capital cases, to hold that the Eighth Amendment prohibited states from sentencing juvenile offenders to life

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[1] Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989).

[2] *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1152 (2009); Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 196–97 (2004) (highlighting the similarities and differences in jury sentencing between capital and non-capital cases).

[3] Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238, 286 (1972), is apparently the origin of the Court's death-is-different capital jurisprudence. *See id.* at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

[4] 130 S. Ct. 2011 (2010).

[5] *See id.* at 2023–30.

without parole for non-homicide crimes.[6] Indeed, Justice Thomas's dissent claimed that "[t]oday's decision eviscerates that distinction. 'Death is different' no longer."[7]

This Article advances a contrary notion. It argues that *Graham* does not eviscerate the death-is-different distinction but instead offers a new category of Eighth Amendment review: life without parole. In other words, the bifurcated death-is-different approach is not being collapsed by *Graham*, but trifurcated. Thus, this Article asserts that life without parole, long obscured by the intense focus of the Court on the death penalty, warrants its own category of Eighth Amendment scrutiny.[8]

While life without parole may not be as "different" from other sentences as the death penalty, it is still "different" enough from all other non-capital sentences to deserve its own set of heightened standards of Eighth Amendment review. A sentence of life imprisonment without the possibility of parole is in many ways no more than a death sentence without an execution date.[9] Further, a life-without-parole sentence is more than a decision that an offender will spend the rest of his life in prison—it simultaneously forecloses the possibility of ever reviewing that determination.[10] A life-without-parole sentence, then, is a one-time judgment that the life of the offender is *irredeemable*.[11]

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[6] *Id.* It is worth noting that "juvenile offenders" are offenders who committed the crime at issue before their eighteenth birthday.

[7] *Id.* at 2046 (Thomas, J., dissenting). Thomas further emphasized, "[f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone." *Id.*

[8] *See, e.g.*, Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861 (2008).

[9] Indeed, Columbia Law Professor Jeffrey Fagan has likened giving a juvenile a life-without-parole sentence to "being buried alive." Jeffrey Fagan, *When Kids Get Life*, PBS (Jan. 23 2007), http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/interviews/fagan.html.

[10] The one exception, of course, is clemency, which is now rarely granted, particularly in non-capital cases. Prior to *Furman*, clemency grants in capital cases were somewhat common, but have decreased significantly over time. *See* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 263 tbl.1 (1991); Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. REV. 349, 353–55, 355 n.38, 355 tbl.1 (2003); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1310 (2004) (noting that prior to *Furman* "governors granted clemency in 20% to 25% of the death penalty cases they reviewed").

[11] The Court in *Graham* characterized recipients of life-without-parole sentences in

Based on this relative "differentness" of life without parole, this Article claims that *Graham* opens the door to a new set of standards in applying the Eighth Amendment to life-without-parole sentences. Specifically, the Article argues that "life without parole" merits its own category of heightened review in the application of the Eighth Amendment, requiring perhaps fewer categorical limitations than the death penalty but certainly greater protections than the "narrow proportionality" limitations previously applied in non-capital cases.[12]

Part Two of the Article reviews the dichotomy between capital and non-capital cases in the Supreme Court's application of the Eighth Amendment and describes the application of these two lines of cases in *Graham v. Florida*. Part Three of the Article explains why life without parole—a sentence to die in prison—is different in its own way. Part Four then argues for the application of a new set of standards under the Eighth Amendment in life-without-parole cases and suggests possible applications of *Graham*.

II. THE "DEATH-IS-DIFFERENT" JURISPRUDENCE OF THE EIGHTH AMENDMENT

Prior to *Graham v. Florida*, the United States Supreme Court's application of the Eighth Amendment to various punishments consisted of two distinct sets of standards—one for capital cases and one for non-capital cases.[13] Both lines of cases begin with the proposition that the Eighth Amendment's prohibition against "cruel and unusual" punishments[14] requires "proportionality" between the offense and the sentence imposed.[15]

The Court, however, has applied two different jurisprudential approaches in determining whether a sentence meets the Eighth Amendment requirement of proportionality.[16] These two approaches and their subsequent application

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this way: "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 130 S. Ct. at 2030.

[12] *See* discussion *infra* Part II.A.2.

[13] *See* Barkow, *supra* note 2.

[14] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[15] *See* Weems v. United States, 217 U.S. 349, 367 (1910) (explaining that inherent in the Eighth Amendment is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense").

[16] It is worth noting that the Court's decision to extend this principle of proportionality, developing its concept of "evolving standards of decency" is a relatively new concept, and really only began in its broader form with its decision in *Atkins v. Virginia*. *See* discussion *infra* Parts II.A.1, II.A.2.

in *Graham v. Florida* are outlined below.[17]

A. *Capital Cases*

In capital cases, the Supreme Court has applied the concept of "evolving standards of decency" to categorically limit the application of the death penalty in certain contexts under the Eighth Amendment.[18] Adopted from the Court's dicta in *Trop v. Dulles*[19] and *Weems v. United States*,[20] two non-capital cases, the "evolving standards of decency" approach views the Eighth Amendment prohibition against cruel and unusual punishments as one that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[21] Thus, while the standard of "cruel and unusual," punishment remains static, the meaning of the standard—what punishments are "cruel and unusual"—evolves over time based on societal standards of morality.[22]

In order to determine whether a particular category of punishment violates the prevailing "standard of decency," the Court employs a two-part inquiry.[23] First, the Court looks to "objective indicia" of state legislatures[24]

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[17] *See* discussion *infra* Parts II.A.1, II.A.2.

[18] *See* discussion *infra* Parts II.A.1, II.A.2.

[19] 356 U.S. 86, 101 (1958).

[20] 217 U.S. 349 (1910). The Court in *Weems* explained, "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Id.* at 373. Justice Stevens's concurrence in *Graham* echoed this sentiment:

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.

Graham v. Florida, 130 S. Ct. 2011, 2036 (Stevens, J., concurring).

[21] *Trop*, 356 U.S. at 101. It is worth noting that while the concepts of "death-is-different" and the "evolving standards of decency" have been part of the Court's jurisprudence since *Furman*, the Court has drastically expanded their reach in recent years with *Atkins*, *Roper*, and *Kennedy*. *See* discussion *infra* Part II.A.2.

[22] *See Graham*, 130 S. Ct. at 2021. In its application, the Court has generally moved in the direction of increasing the number and type of punishments prohibited by the Eighth Amendment. This is arguably consistent with the conception of the Framers of the Constitution. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1793–1800 (2008).

[23] I have written elsewhere about the problems with this approach and suggested an

and jury decisions to determine the degree to which the applicable punishment is available and the degree to which it is actually used.[25] In particular, the Court looks to these objective indicia to determine whether there is a national consensus against the sentencing practice at issue.[26]

Then, the court brings "its own judgment to bear" to determine whether a particular punishment is cruel and unusual.[27] In doing so, the Court looks to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[28] In particular, the Court asks whether the punishment in question can be justified by one or more of the purposes of punishment in determining whether the punishment in question violates the Constitution.[29]

The Court has used the "evolving standards of decency" approach to erect Eighth Amendment limitations to the use of the death penalty. The Eighth Amendment limits the use of the death penalty based on (1) the nature of the offense and (2) the characteristics of the offender.[30] In other words, as explained below, the Eighth Amendment forecloses the availability of capital punishment for certain categories of offenses and for certain categories of individuals.[31]

1. *Categorical Limitations Based on the Nature of the Offense*

The Supreme Court's first post-*Gregg*[32] categorical limitation on the use

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alternative means to achieve the same end. *See* William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: the Ironic Consequences of "Death-is-Different" Jurisprudence*, 28 PACE L. REV. 15, 21–24 (2007).

[24] The Court counts both the number of jurisdictions that use a particular punishment, *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–16 (2002), and the direction/trend of usage, *see, e.g.*, Roper v. Simmons, 543 U.S. 551, 564–65 (2005).

[25] The Court employed the latter approach in *Graham*, where it found that life without parole for juvenile offenders was used so little as to be unusual. *Graham*, 130 S. Ct. at 2026.

[26] *Roper*, 543 U.S. at 564.

[27] Coker v. Georgia, 433 U.S. 584, 597 (1977).

[28] Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008).

[29] *See id.*, 128 S. Ct. at 2649–50; *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 349; *Coker*, 433 U.S at 592.

[30] *See Graham*, 130 S. Ct. 2011, 2026–27 (2010).

[31] *See id.*

[32] The Court, of course, initially used the Eighth Amendment to prohibit the use of the death penalty altogether in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972), but four years later in *Gregg v. Georgia*, 428 U.S. 153, 154 (1976) and its companion cases,

of the death penalty came in *Coker v. Georgia*,[33] where the Court held that capital punishment was a constitutionally impermissible punishment for rape.[34] There, the Court reasoned that the death penalty is a "grossly disproportionate and excessive punishment for the crime of rape, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[35]

The Court further limited the states' use of the death penalty in *Enmund v. Florida*,[36] where it held that the Eighth Amendment prohibited the imposition of the death penalty against an accomplice to a felony murder who did not participate in or intend the killing.[37] In *Enmund*, the Court explained its decision as follows: "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike . . . [t]his was impermissible under the Eighth Amendment."[38]

Finally, in *Kennedy v. Louisiana*,[39] the Court held that capital punishment is impermissible for non-homicide crimes against individuals.[40] The Court in *Kennedy*, in striking down a death sentence for the rape of a child, reinforced the notion that the "evolving standards of decency" in the capital punishment context "means that resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application."[41]

As discussed above, the Court looked to the state legislatures to establish an objective consensus, before then applying its own subjective view (based largely on the purposes of punishment) that the Eighth Amendment prohibited a death sentence in that category.[42] With all of these categories, then, the Eighth Amendment bars the use of capital punishment in large part *because* the culpability of the offender, in light of the nature of the offense, does not warrant a death sentence.[43]

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reinstated its use with the adoption of new state statutory schemes. *See id.* at 179–81; *see also* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 45–55 (2007) (describing the strong response of states in opposition to the *Furman* decision).

[33] 433 U.S. at 597.

[34] *See id.* at 592.

[35] *Id.*

[36] 458 U.S. 782 (1982).

[37] *Id.* at 798.

[38] *Id.*

[39] 128 S. Ct. 2641 (2008).

[40] *Id.*

[41] *Id.* at 2665.

[42] *See id.*, 128 S. Ct. at 2658; *Enmund*, 458 U.S. at 789; *Coker*, 433 U.S. at 595.

[43] *See Kennedy*, 128 S. Ct. at 2659–60; *Enmund*, 458 U.S. at 798; *Coker*, 433 U.S. at

2. *Categorical Limitations Based on Offender Characteristics*

The Court has placed two Eighth Amendment limitations on the use of capital punishment based on the characteristics of the offender.[44] The Court imposed its first limitation, offenders with limited mental capacity, in *Atkins v. Virginia*.[45] In *Atkins*, the Court established the categorical rule that the Eighth Amendment prohibited the execution of individuals with "mental retardation."[46] Three years later, in *Roper v. Simmons*,[47] the Court imposed a second limitation based on the age of the offender.[48] In *Roper*, the Court held that the Eighth Amendment barred the execution of individuals for crimes they committed before their eighteenth birthday.[49]

In its application of the "evolving standards of decency," the Court counted the state statutes supporting the particular practice, analyzed the direction of changes in the state legislature, and reviewed international opinion in finding a consensus against death sentences for juveniles and individuals with limited mental capacity.[50] Further, the Court's subjective justification for these categorical restrictions rested largely on its view that offenders in both categories have a diminished capacity and are therefore somehow less culpable for their crimes than other offenders.[51] As to individuals with mental functioning in a low range, the Court commented that such "defendants in the aggregate face a special risk of wrongful

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[44] Interestingly, the Court initially rejected these limitations before reversing its views on each characteristic. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Eighth Amendment does not prohibit the execution of mentally retarded individuals); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment does not prohibit the execution of juveniles aged sixteen or older at the time of the offense).

[45] 536 U.S. 304 (2002).

[46] *Id.* at 321. While citing an IQ below 70 as evidence of "mental retardation," the Court did not itself articulate a standard for "mental retardation," stating, "[a]s was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986) (alteration in original)).

[47] 543 U.S. 551 (2005).

[48] *Id.* at 578–79. The Court had previously held that offenders younger than sixteen-years-old at the time of the commission of the crime could not be executed under the Eighth Amendment. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[49] *Roper*, 543 U.S. at 578–79.

[50] *See id.*, 543 U.S. at 565; *Atkins*, 536 U.S. at 316.

[51] *See Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319.

execution" for many reasons including the possibility of false confession and the inability to provide adequate assistance to counsel.[52] Likewise, with juvenile offenders, the Court explained that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[53]

B. *Non-Capital Cases*

In contrast to the "evolving standards of decency" approach employed in capital cases, the Court has applied a "narrow proportionality principle" to determine whether non-capital sentences violate the Eighth Amendment.[54] Generally, the Court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive."[55] This proportionality principle "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[56]

While the Court admits that it has "not established a clear or consistent path for courts to follow" in applying this narrow proportionality principle, its cases guide the application of this principle.[57] The Court's first modern opinion on proportionality with respect to sentence length in a non-capital case came in *Rummel v. Estelle*.[58] In *Rummel*, the Court considered whether a Texas statute mandating life imprisonment (with the possibility of parole) based on the defendant's three prior minor felonies violated the proportionality requirement of the Eighth Amendment.[59] The Court held that Rummel's sentence was proportionate, and emphasized the general need to defer to the judgment of state legislatures, such that findings of excessiveness with respect to sentence length should be "exceedingly rare."[60]

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[52] *Atkins*, 536 U.S. at 320–21.

[53] *Roper*, 543 U.S. at 572–73.

[54] Graham v. Florida, 130 S. Ct. 2011, 2037 (2010); Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring).

[55] *Graham*, 130 S. Ct. at 2021.

[56] *Harmelin*, 501 U.S. at 997, 1001 (Kennedy, J., concurring in part and concurring in the judgment).

[57] Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

[58] 445 U.S. 263 (1980).

[59] The felonies were theft by false pretenses of $120.75, fraudulent use of a credit card in the amount of $80, and issuing a bad check in the amount of $28.36. *Id.*

[60] *Id.* at 272. The Court similarly found in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), that a sentence for forty years for possession of marijuana with intent to

The only post-*Furman* case (other than *Graham*) in which the Court has found that the Eighth Amendment barred a punishment in a non-capital case is *Solem v. Helm*.[61] In *Solem*, the Court held that a sentence of life without parole for a seventh non-violent offense, the passing of a bad check, was disproportionate.[62] In doing so, the Court clearly established the applicability of the Eighth Amendment to the length of terms of imprisonment.[63]

The Court then described three objective factors to be used to guide proportionality analysis. First, the Court must take the obvious first step of looking "to the gravity of the offense and the harshness of the penalty."[64] Second, the Court noted that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction," as "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[65] Third, the Court emphasized that "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[66]

Until now, however, *Solem* was the exception rather than the rule, as the Court consistently (before *Graham*) refused to use the Eighth Amendment to bar non-capital sentences.[67] In *Harmelin v. Michigan*, the Court again cast

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distribute and distribution of marijuana was not excessive under the Eighth Amendment.

[61] 463 U.S. 277 (1983). While this was the first case in which the Supreme Court had invalidated a sentence on proportionality grounds, lower courts had, on occasion, used the Eighth Amendment to invalidate "excessive" sentences. *See, e.g.*, Hart v. Coiner, 483 F.2d 136, 138 (4th Cir. 1973) (reversing a mandatory life sentence for a third felony conviction); McKinney, 427 F.2d 449, 450 (6th Cir. 1970) (affirming a five-year sentence for refusal to submit to induction into the military); United States v. Thacker v. Garrison, 445 F. Supp. 376, 376–80 (W.D.N.C. 1978) (granting writ of habeas corpus for a forty-eight year sentence for safe cracking); *In re* Lynch, 503 P.2d 921, 922 (Cal. 1972) (reversing an indeterminate life sentence for a second offense of indecent exposure); People v. Lorentzen, 194 N.W.2d 827, 834 (Mich. 1972) (vacating a twenty-year mandatory minimum sentence for selling any amount of marijuana); State v. Kimbrough, 46 S.E.2d 273, 275–77 (S.C. 1948) (setting aside a thirty-year prison term for burglary).

[62] *Solem*, 463 U.S. at 299.

[63] *Id.*

[64] *Id.* at 290–91.

[65] *Id.* at 291.

[66] *Id.*

[67] The complete line of cases is as follows: Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of

doubt on the ability of offenders to succeed in "excessiveness" claims based on the term of a sentence in non-capital cases.[68] While Justice Scalia and Chief Justice Rehnquist concluded that proportionality analysis should apply only in capital cases,[69] the controlling plurality of Justices Kennedy, O'Connor, and Souter reaffirmed the existence of a proportionality principle in non-capital cases, but also emphasized its narrowness.[70] Justice Kennedy's opinion made clear that "only extreme sentences that are 'grossly disproportionate' to the crime" are prohibited by the Eighth Amendment.[71]

The only other significant test as to the reach of the Eighth Amendment proportionality requirement in non-capital cases prior to *Graham* came in a challenge to California's recidivist three strikes law.[72] In *Ewing v. California*, the Court rejected a challenge to a sentence of twenty-five years to life for stealing several golf clubs.[73] Like *Harmelin*, *Ewing* emphasized the need to defer to state legislatures in non-capital cases and restrict the scope of the Eighth Amendment's narrow proportionality principle to rare cases.[74]

The Court's overall approach, then, to the use of proportionality as a basis for declaring non-capital sentences unconstitutional has been one of restraint and deference to the states. Again, the "death-is-different" distinction provided a clear separation between non-capital and capital cases before *Graham*.

C. Graham v. Florida

In *Graham v. Florida*, the Court considered the issue of whether the Eighth Amendment prohibited states from sentencing a juvenile to life

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cocaine); Solem v. Helm, 463 U.S. 277, 281–84 (1983) (reversing sentence of life without parole for presenting a no account check for $100, where defendant had six prior felony convictions); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions).

[68] 501 U.S. 957 (1991). Harmelin received a mandatory sentence of life without parole based on his possession of 672 grams of cocaine. *Id.* at 961.

[69] *Id.* at 994.

[70] *Id.* at 997 (Kennedy, J., concurring).

[71] *Id.* at 1001 (Kennedy, J., concurring).

[72] Ewing v. California, 538 U.S. 11 (2003).

[73] *Id.*; *see also* Lockyer v. Andrade, 538 U.S. 63 (2003) (rejecting a similar claim that a sentence under the three strikes law was excessive in violation of the Eighth Amendment).

[74] *Ewing*, 538 U.S. at 30.

without parole.[75] Terrance Graham committed armed burglary at age sixteen.[76] Under a plea agreement, the trial court sentenced Graham to probation and withheld adjudication of guilt.[77] When Graham violated the terms of his probation by committing additional crimes, the trial court revoked his probation and sentenced him to life in prison for the initial burglary.[78] Graham appealed, arguing that it violated the Eighth Amendment's prohibition against excessive or disproportionate sentences and that categorically, sentencing juveniles to life without parole was "cruel and unusual."[79]

The issue in *Graham*, then, was at the intersection of the two lines of cases. On the one hand, *Graham* involved a non-capital crime like *Harmelin* and *Ewing*, but on the other hand, it involved a categorical challenge to the application of the Eighth Amendment to a class of offenders, here, juveniles like in *Roper*. In a 6–3 decision,[80] the Court held that under the "evolving standards of decency" test the imposition of a sentence of life without parole for a juvenile offender involved in a non-homicide crime is prohibited.[81]

In his majority opinion, Justice Kennedy explained that unlike *Harmelin*, in this case "a sentencing practice itself" was in question.[82] In other words, "[t]his case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[83] Accordingly, "a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question

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[75] 130 S. Ct. 2011, 2017–18 (2010). A companion case, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010), was dismissed as improvidently granted.

[76] *Graham*, 130 S. Ct. at 2018. In the initial burglary, Graham was an accomplice in a failed attempt to rob a restaurant during which no money was taken. *Id.* Graham's accomplice did assault the restaurant manager with a metal bar, requiring stitches to his head. *Id.*

[77] *Id.*

[78] *Id.* at 2019–20.

[79] *Id.* at 2020. The Florida Supreme Court denied review.

[80] Chief Justice Roberts agreed with the judgment of the Court, but wrote separately to express his disagreement with the Court's adoption of a categorical Eighth Amendment ban for the sentencing of juvenile offenders to life without parole in non-homicide cases. *Id.* at 2038 (Roberts, C.J., concurring).

[81] *Id.* at 2021 (majority opinion). Importantly, the Court did not foreclose the possibility of applying a heightened Eighth Amendment standard to limit other non-capital sentences that impact an entire class of offenders, including presumably, life without parole. *Id.* at 2022–23 ("This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.").

[82] Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

[83] *Id.* at 2022–23.

presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*."[84]

For the first time, then, the Court applied its "evolving standards of decency" analysis in a non-capital case.[85] In doing so, it neglected to mention its long tradition of death-is-different jurisprudence.[86] The Court had crossed, without explanation, the clear and previously unquestioned Eighth Amendment divide between capital and non-capital cases. Nowhere in the Court's prior jurisprudence had the Court given any credence to the idea that a categorical sentencing question merited "evolving standards of decency" review. Indeed, the Court had long trumpeted the theme of death-is-different to justify the categorical exclusions in its capital cases.[87]

This departure from prior practice by the majority was not lost on the other Justices. In dissent, Justice Thomas explained that "[t]oday's decision eviscerates that distinction [between capital and non-capital cases]. 'Death is different' no longer."[88] Thomas continued:

> The Court's departure from the "death is different" distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that "a sentence of death differs in kind from any sentence of imprisonment, *no matter how long*."[89]

Chief Justice Roberts, who concurred in the judgment, but not in the adoption of a categorical rule, echoed the same sentiment:

> Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that "the death penalty is different from

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[84] *Id.* at 2023.

[85] *Trop v. Dulles* was of course a non-capital case, but the Court merely derived the general concept of "evolving standards of decency" there. 356 U.S. 86, 101 (1958). Prior to *Graham*, all other post-*Furman* applications of the "evolving standards of decency" had been in capital cases.

[86] *See* discussion *supra* Part II.A.

[87] *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (death differs from life imprisonment because of its "finality"); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability.").

[88] *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting).

[89] *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

> other punishments in kind rather than degree." It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are "less severe than death" despite involving "forfeiture of some of the most basic liberties." Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders.[90]

Rather than presume that the Court was in some way abandoning its longstanding commitment to the idea that death-is-different, it is highly possible that the Court was identifying a new category that required a higher level of Eighth Amendment scrutiny than the "narrow proportionality" principle provides. The Court's instinct clearly was that, although this was not a capital case, it was *somehow different enough* to warrant the heightened Eighth Amendment standard used in capital cases.

Justice Kennedy's description of life without parole and its similarity to the death penalty provide a clue as to this instinct:

> As for the punishment, life without parole is "the second most severe penalty permitted by law." It is true that a death sentence is "unique in its severity and irrevocability"; yet life-without-parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.[91]

For the Court, then, life without parole is *both like* the death penalty and *different than* other non-capital punishments. The remainder of this Article explores the evidence in support of that proposition, as well as the potential impact of this truism on the application of the Eighth Amendment.

III. WHY LIFE WITHOUT PAROLE OFFERS ITS OWN KIND OF "DIFFERENT"

A. *The Reality of Life Without Parole*

1. *Life Without Parole Is Different in the Same Way That Death Is Different*

While the death penalty is certainly a "different" punishment based on its

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[90] *Id.* at 2038–39. (Roberts, C.J., concurring) (citations omitted).

[91] *Id.* at 2027 (majority opinion) (citations omitted).

severity and irrevocability, a life-without-parole sentence shares many of the qualities of a death sentence.[92] At its very core, a life-without-parole sentence is a sentence to die in prison—a death sentence without an execution date.[93] While not specifying *when* one will die, life without parole, like the death penalty, does specify *where* one will die.[94] In addition, the absence of parole results in an irrevocable and permanent sentence like the death penalty, subject only to the appellate reversal of the sentence or a grant of clemency by the governor or President.[95]

Life-without-parole sentences and capital sentences also share the reality that one has no legitimate absolute loss of hope of escaping confinement prior to death.[96] Both sentences are determinations that the offender no longer possesses the ability to offer anything positive to society and should be separated from society until death.[97]

Further, in certain ways, a sentence of life without parole can be worse than a sentence of death.[98] A death sentence has an end date during which one's imprisonment will end, which for some may be less traumatic than being imprisoned until one dies of natural causes.[99] To the extent that living in prison constitutes suffering, life without parole allows for greater suffering, or at least a longer time period for suffering.[100] One example of the desirability of ending one's time in prison as soon as possible is the

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[92] *See, e.g.*, Fagan, *supra* note 9.

[93] *See, e.g.*, Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 611 (2007) ("[Life without parole] removes any prospect of reward for change and is therefore fundamentally inhumane. If society is going to announce baldly that we don't care what you do, we don't care what programmes you engage in, you're never going to be released, it's the equivalent of providing a death sentence." (quoting another source)).

[94] Of course, the place is different—with the death penalty the death will be in the execution chamber, with life without parole it will be in prison.

[95] *See* sources cited *supra* note 10 and accompanying text.

[96] *See* Appleton & Grøver, *supra* note 93, at 610.

[97] *Id.*

[98] Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.143 (1998) (citing cases where inmates preferred death sentences to terms of life in prison); *see also* Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855–61 (1987).

[99] *See* Appleton & Grøver, *supra* note 93, at 610.

[100] *See, e.g.*, Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1 ("I wish I still had that death sentence. Really, death has never been my fear. What do people believe? That being alive in prison is a good life? This is slavery." (quoting prisoner Randy Arroyo commenting on his converted sentence. Arroyo had been sentenced to death as a juvenile, but was spared by the *Roper* decision)).

prevalence of "volunteers" in capital cases—individuals who choose to waive their appeals and accelerate their execution date.[101]

Practically, a sentence of life without parole can also be worse than a death sentence in that the possibility of reversal is dramatically less.[102] Precisely because "death-is-different," capital cases often receive far more extensive and careful review than life-without-parole sentences.[103] The reversal rate in life-without-parole cases is far less than in capital cases, and even where error is found, courts are more likely to consider it harmless in a life-without-parole case than in a capital case.[104]

Similarly, governors and/or the President have historically been far less likely to grant clemency in a life-without-parole case than in a capital case.[105] Again, because execution dates seem more imminent than life-without-parole sentences, they garner significantly more executive attention than non-capital life-without-parole cases.[106]

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[101] *See, e.g.*, John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 940 n.5 (2005); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 nn.1–2 (2002); *see also* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 860–61 (1983); Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1902 (1998).

[102] *See, e.g.*, Alex Kozinski & Steven Bright, Debate, *The Modern View of Capital Punishment*, *in* 34 AM. CRIM. L. REV. 1353, 1360–61 (1997) (quoting Judge Alex Kozinski's view that innocent defendants are better off being charged with a capital crime in California because they will get "a whole panoply of rights of appeal and review that you don't get in other cases"); Patrick McIlheran, *Illinois Re-Examines Life Sentences*, MILWAUKEE J. SENTINEL, Oct. 25, 2006, at 13A ("[T]he safeguards that states build into capital cases—the things that make the death penalty so costly—make it less likely an innocent man will be executed than simply imprisoned wrongly.").

[103] Kozinski & Bright, *supra* note 102; *see also* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1853 (2006) ("Unlike death sentences, which merit a heightened level of appellate review, life-without-parole sentences receive no special consideration from appellate tribunals . . . .").

[104] Note, *supra* note 103. The estimated rate of reversal for non-capital sentences is approximately seven percent, while according to one study the rate of reversal of a capital sentence is seventy-three percent at the federal court of appeals level. *Id.*

[105] *See* sources cited *supra* note 10 and accompanying text.

[106] Media coverage of such issues operates in the same manner, politically reinforcing this reality. *See* Berman, *supra* note 8, at 870–71 (discussing the unique societal interest in capital punishment); *see also*, Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004); J. Richard Broughton, *Every Day More Wicked: Reflection on Culture, Politics, &*

2. *Life Without Parole Is Different Than All Other Non-Capital Sentences*

Whether or not life without parole is worse than a death sentence, life without parole clearly shares many characteristics with death sentences. Notwithstanding these characteristics, life without parole can be clearly differentiated from all other non-capital sentences.

First, its level of societal censure is far more significant than any other non-capital sentence.[107] A sentence of life without parole says something far more than one deserves punishment for his transgressions.[108] It makes a societal judgment that, as a person, one's life is irredeemable.[109] This one-time assessment of an offender's culpability communicates the sentiment that his life is essentially over, that there can be no possibility for utility or contribution to society.[110]

Even a sentence of life imprisonment with the possibility of parole is drastically different than a life-without-parole sentence, in that it communicates the possibility that one can again re-enter society.[111] There exists a hope, no matter how dim it may be, that one can redeem one's transgressions and rejoin society.[112]

Punishment by Death, 22 J.L. & POL. 113, 114–15 (2006) (discussing the attention given to capital punishment by the media, as well as the motion picture industry). *See generally* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

[107] *See* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 12–34 (2005) (explaining the role of censure as the blaming response to the proscribed conduct which serves as the moral communication to the offender that conveys the critical normative message that his or her conduct is unacceptable).

[108] The Court in *Graham* explained, "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[109] *See* Appleton & Grøver, *supra* note 93, at 611.

[110] The Court in *Graham* characterized it as follows, "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 130 S. Ct. at 2032.

[111] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 297 (1983) (describing the offender's life-without-parole sentence as "far more severe than the life sentence [ ] considered in *Rummel*" because the sentence did not give the possibility of parole).

[112] *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 280–81 (1980) (explaining the distinction between Rummel's sentence of life and a life-without-parole sentence). The Court in *Rummel* explained:

> [B]ecause parole is "an established variation on imprisonment of convicted criminals," a proper assessment of Texas' [sic] treatment of Rummel could hardly

Second, a life-without-parole sentence extinguishes the opportunity for redemption. This sentence means that there is no hope for rehabilitation and no hope for rejoining society, *regardless* of the level of repentance or personal change one might undergo.[113] Life without parole, by definition, communicates the foreclosure of any *relevance* of one's ability to change and closes the door on one's outside life forever.[114]

Third, life without parole necessitates a different set of prison conditions. Educational opportunities and vocational training services that are available to other inmates are typically not available to life-without-parole inmates, especially juveniles.[115] When confronted with limited resources, prisons often give educational, technical, and other services to the inmates with the shortest sentences, therefore denying access for life-without-parole prisoners.[116] As the Court in *Graham* explained, "In some prisons, moreover, the system itself becomes complicit in the lack of development. . . . [I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[117]

B. *The Use of Life Without Parole*

The frequency of life without parole as a sentence furthers the notion that it is a "different" punishment that warrants its own set of Eighth Amendment standards and limitations. While its use was not widespread until the 1990s,[118] forty-nine jurisdictions in the United States currently have such sentences for certain crimes.[119] The way in which these jurisdictions use life

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> ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person [. . . with] a sentence of life without parole.

Id. (citations omitted).

[113] In *Graham*, the Court explained that "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Graham*, 130 S. Ct. at 2032–33.

[114] *See* VON HIRSCH & ASHWORTH, *supra* note 107, at 23.

[115] Brief of the Sentencing Project as Amicus Curiae in Support of Petitioners at 11–12, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412).

[116] *Id.*

[117] *Graham*, 130 S. Ct. at 2032–33.

[118] Note, *supra* note 103, at 1842. Thirty states had a life-without-parole statute in 1990. By 2005, that number had grown to forty-eight states plus the District of Columbia. *Id.*

[119] *Id.* New Mexico and Alaska are the only states that do not currently have life without parole as an available punishment.

without parole, as explained below, underscores the need for careful review of its use and increased scrutiny under the Eighth Amendment.

1. *Life Without Parole as a Substitute for the Death Penalty*

The emergence of life without parole as a punishment and its increasing use in recent years has been attributed largely to its role as a substitute for capital punishment in aggravated homicide cases.[120] Indeed, as the number of new death sentences has declined to levels not seen since the mid-1970s, the number of life-without-parole sentences has correspondingly skyrocketed.[121]

Because it has been used as an alternative to a death sentence, the impact and seriousness of the life-without-parole sentence has been discounted.[122] As a "better alternative" to a death sentence, life-without-parole sentences can appear to be a good outcome for a capital offender, when in reality it is a very harsh, hopeless punishment.[123] But, just as all first degree murders do not warrant death sentences, not all "death-eligible" crimes deserve a sentence of life without parole.[124] In several jurisdictions, the available sentences for aggravated murder convictions are limited to death or life without parole, and do not include an option of life with parole or some lesser sentence.[125]

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[120] Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall?: The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008) ("The widespread adoption of this alternative [life without parole] has likely contributed substantially to the extraordinary decline in death sentences nationwide—a greater than fifty percent decline over the past decade."); *see also* Marc Mauer et al., *The Meaning of "Life": Long Prison Sentences in Context*, THE SENTENCING PROJECT, 5 (May 2004) www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf.

[121] Appleton & Grøver, *supra* note 93, at 600. The ratio of the life-without-parole population to the U.S. prison population has increased to such an extent that it is currently a hundred times greater than it was thirty years ago. *Id.* In 2006, one in every thirty-five prisoners was serving a life-without-parole sentence. *Id.*; *see* Steiker & Steiker, *supra* note 120, at 158.

[122] *See* Note, *supra* note 103, at 1853.

[123] *See* Steiker & Steiker, *supra* note 120, at 176–77 ("[T]he number of potentially death-sentenced defendants spared because of the LWOP [life without parole] alternatives pale in comparison to the enormous number of non-death-eligible inmates who are now trapped without hope of parole because of LWOP's widespread adoption.").

[124] This is particularly true in the case of felony murder. *See* discussion *infra*, Part IV.C.1.

[125] *See* Appleton & Grøver, *supra* note 93, at 599 (describing various state statutory schemes).

2. *Life Without Parole in the Shadow of the Death Penalty*

In addition to being a substitute for capital punishment, life without parole also suffers from the shadow of capital cases in the way such cases are litigated and appealed.[126] Death penalty cases warrant a far more extensive use of resources than non-capital cases, creating a lack of focus on the punishment of life without parole.[127] Based on the perception that less is at stake, non-capital cases do not enjoy the financial support and lawyer resources that capital cases sometimes do.

Similarly, life-without-parole cases do not have the same safeguards in terms of appellate review.[128] While capital cases in most states have mandatory appeals to the state Supreme Court, life-without-parole sentences do not.[129] In addition, there is no mandatory representation required by the Sixth Amendment on appeal for non-capital sentences.[130]

Finally, as mentioned previously, life-without-parole sentences receive a different level of scrutiny than capital cases on appeal.[131] Given the volume of capital cases and the large amount of judicial resources expended on them, life-without-parole sentences are far more likely to be cursorily reviewed on appeal. Even when such cases are explored more thoroughly on appeal, errors in such cases are far more likely to be deemed harmless than in capital cases.

All of the evidence concerning the usage of life without parole reflects the consensus that death-is-different. Given the realities of life-without-parole sentences as explained above, though, it would be a mistake to conclude that such evidence provides a reason not to create a new category of Eighth Amendment standards for life without parole. If anything, the manner in which the death penalty has overshadowed life without parole makes

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[126] Markus Dirk Dubber, *Recidivist Statutes as a Rational Punishment*, 43 BUFF. L. REV. 689, 713 (1995) ("[A sentence of life without parole] has come to be regarded as a benign penalty, thanks in no small part to the 'death is different' campaign of opponents of capital punishment."); *see also* Steiker & Steiker, *supra* note 120, at 175 (noting that the strategy of death penalty abolitionists to rely on harsh incarceration sanctions as an alternative to the death penalty might lead to lengthy terms of incarceration being viewed "as a 'lesser' evil instead of as an evil in itself.").

[127] *See generally* Berman, *supra* note 8; Kozinski & Bright, *supra* note 102.

[128] *See* Barkow, *supra* note 2, at 1162; Mauer et al., *supra* note 120, at 20. Mauer notes that "unlike defendants in capital cases, persons sentenced to life have no right to post-conviction counsel in most states." *Id.*

[129] Mauer et al., *supra* note 128, at 20; *see* Kozinski & Bright, *supra* note 102, at 1361.

[130] *See* Kozinski & Bright, *supra* note 102, at 1360.

[131] *See* Dubber, *supra* note 126, at 714; Steiker & Steiker, *supra* note 120, at 156.

reconsideration of greater protections in this area all the more important.[132]

3. *Penal Populism and the Popular Acceptance of Life Without Parole*

In addition to its link to capital punishment, the concurrent rise of penal populism in the United States has facilitated the popular acceptance of the widespread use of life without parole. After decades of politicians running on "tough on crime" platforms, the United States continues to imprison its citizens at heretofore unprecedented rates.[133] The United States currently has twenty-five percent of the world's prison population, despite having only five percent of the world's total population.[134] In addition, one out of every hundred American citizens is currently in prison.[135]

The use of life without parole in the United States is similarly high. The ratio of the life-without-parole population to the United States prison population is now one hundred times greater than it was thirty years ago.[136] As of 2006, one in every thirty-five prisoners was serving a sentence of life without parole.[137]

This is particularly true compared to the rest of the world, where life-without-parole sentences are used much less frequently, if at all.[138] Even in the United Kingdom, which has abolished capital punishment and allows for life without parole, only a handful of prisoners are serving the equivalent of a

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[132] *See generally* Barkow, *supra* note 2.

[133] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719, 725–29 (2005) (discussing lawmakers' incentives to add new offenses and enhance penalties and the unfortunate consequences that result); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (discussing criminal law's push toward more liability).

[134] *See Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearings Before the J. Economic Comm.*, 110th Cong. 1 (2008) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.). Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system. And I choose to believe the latter." *Id.*

[135] *See* BUREAU OF JUSTICE STATISTICS, http://www.ojp.usdoj.gov/bjs (last visited May 25, 2010).

[136] *See* Appleton & Grøver, *supra* note 93, at 600.

[137] *Id.*

[138] Five European countries, Croatia, Norway, Portugal, Slovenia, and Spain, make no legislative provision for life imprisonment at all. Appleton & Grøver, *supra* note 93, at 601. Most member states of the European Union have some provision for a life sentence, but few anticipate those sentences will result in a prisoner spending the rest of his life in prison. *Id.*

life-without-parole sentence.[139]

Given the broad public support and general lack of sympathy for individuals sentenced to life without parole, the Court has all the more reason to protect the individual liberties[140] against the "tyranny of the majority"[141] by re-examining the Eighth Amendment as a tool to protect certain categories of individuals from excessive criminal sentences.[142]

C. *The Penological Justifications for Life Without Parole*

When determining whether a sentence is excessive under the Eighth Amendment, the Court's application of the "evolving standards of decency" hinges in part on its assessment of whether the punishment at issue (typically, death) can be justified by one or more of the purposes of punishment in a given situation. As part of explaining why life without parole is "different" enough to demand its own set of Eighth Amendment standards, it is instructive to explore the degree to which it can be justified by the various purposes of punishment. In particular, the degree to which a sentence of life without parole cannot be justified in certain situations may suggest both (1) why it ought to be accorded its own "different" status and (2) the areas in which the Eighth Amendment could or should be used to limit the use of life without parole.

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[139] Nigel Newcomen, *Managing the Penal Consequences of Replacing the Death Penalty in Europe*, *in* N. Browne and S. Kandelia, eds., MANAGING EFFECTIVE ALTERNATIVES TO CAPITAL PUNISHMENT, CENTRE FOR CAPITAL PUNISHMENT STUDIES OCCASIONAL PAPER SERIES VOLUME THREE—SPECIAL EDITION (2005). As of 2005, only twenty-two offenders were serving such a sentence in the UK. *Id.*

[140] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the Court's constitutional jurisprudence must ensure that everyone's interests are represented when decisions are made and that it must correct political process failures).

[141] Although, as history has shown, the Court eventually moves toward popular opinion in most cases. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[142] *See* Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 4 (2003) ("It is cruel and unusual punishment, a violation of the Eighth Amendment, to sentence a person to life in prison for committing a minor offense."); *see also* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

1. *Incapacitation and Life Without Parole*

The most obvious justification for life without parole is incapacitation.[143] The theory of incapacitation justifies punishment on the grounds that the offender still is a danger to society, and, as a result, needs to be imprisoned to keep society safe.[144] While choosing at sentencing to foreclose one's return to society by sentencing them to life without parole on incapacitation grounds, the judge or jury makes the determination that the individual *will always* be dangerous to society.[145]

In some cases, such a determination certainly may be appropriate, but in many other cases, questions arise as to the ability of incapacitation to justify life without parole. First, there is the question of whether one can make a judgment that an offender will *always* be dangerous in some cases. At some point, whether based on age, infirmity, or possibly change in character, it is foreseeable that many offenders could be considered to be no longer dangerous.[146] As a result, it is easy to see how incapacitation, an assessment of future dangerousness, is insufficient to justify a decision that the individual *always* will be dangerous to society. In other words, the possibility that one could no longer be dangerous undercuts the penological justification for making a one-time assessment that an offender will always need to be incapacitated.

An even more significant question concerning the efficacy of using incapacitation to justify a sentence of life without parole is the evidence concerning the actual ability to determine accurately whether or not an individual does in fact pose a future danger to society. The incontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative. For over the past twenty years, the American Psychiatric Association has maintained that predictions of future threats are "wrong in at least two out of every three cases."[147] In addition, the American

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[143] By contrast, incapacitation, or future dangerousness, provides virtually no legitimate justification for the use of capital punishment. *See* William W. Berry III, *Ending Death by Dangerousness*, 52 ARIZ. L. REV. (forthcoming 2010).

[144] *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 67–92 (4th ed., Cambridge Univ. Press 2005) (1992). *See generally* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW 109–33 (2009).

[145] Robinson, *supra* note 144, at 109–33.

[146] This is particularly the case with juvenile offenders, as the Court pointed out in *Graham*, who will presumably spend a longer period of time in prison than older offenders. Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

[147] Brief of the American Psychiatric Ass'n as Amicus Curiae for Petitioner at 9, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080), 1982 Briefs 6080 (1982) ("The large body of research in this area indicates that, *even under the best conditions*,

Psychiatric Association has flatly stated that "[m]edical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy."[148] These assertions remain supported by recent studies that continue to demonstrate the extreme inaccuracy in predicting future dangerousness.

In what may be the most recent study of life-sentenced defendants, the authors found the error rate of dangerousness assertions in federal cases is "sobering, both in its inability to discriminate who will and will not engage in violent misconduct in prison and in the minority who fulfill the prediction."[149] Less than one percent of federal inmates in the study perpetrated an assault causing moderate injuries,[150] and none of the prisoners caused a life threatening injury or assaulted a member of the prison staff.[151] More importantly, none of the prisoners whom the government claimed were dangerous had committed another homicide while incarcerated.[152]

The results of these studies ought not to be surprising, given that mental health professionals themselves are skeptical of their own predictions. In a study of several hundred practicing physicians, clinical psychologists, and mental health lawyers, the mean self-reported estimate of percentage of accurate future dangerousness predictions fell between forty and forty-six percent.[153] Thus, the inability of psychiatrists, much less judges and jurors, to make determinations of future dangerousness with any reliability casts doubt upon the ability to rely on incapacitation as a justification for life without parole.

Given, then, the potential for inaccuracy of future dangerousness determinations, the length of a potential sentence, and the corresponding likelihood that the initial determination could be erroneous, life-without-parole sentences become increasingly less justified the younger the offender is. As a result, the Eighth Amendment limit on juvenile life-without-parole sentences adopted in *Graham*, as well as additional restrictions based on the

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psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases." (emphasis added)).

[148] *Id.* at 8–9.

[149] Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 LAW & HUM. BEHAV. 46, 61 (2008).

[150] *Id.* "Moderate injuries" are those "requiring evacuation to an outside hospital, but not life-threatening." *Id.*

[151] *Id.*

[152] *Id.*

[153] *See* Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, 3 CRIM. JUST. 18, 21 (1989).

age of the offender, seem justifiable when considered in the narrow context of whether they can be supported by a penological goal of future dangerousness.[154]

2. *Deterrence and Life Without Parole*

The theory of general deterrence[155] justifies a particular punishment based on its ability to deter others from committing the same crime.[156] Deterrence can be a legitimate justification for a sentence of life without parole for some crimes.[157] Like incapacitation, however, deterrence is not without difficulty as a justification for life without parole in some cases. The first difficulty is determining the degree to which a particular punishment will deter as compared to a lesser punishment. In other words, the marginal level of deterrence between a sentence of life with parole and life without parole may be such that a life-without-parole sentence has no marginal deterrent effect. As a result, a life-without-parole sentence may not deter any more than a substantial prison sentence. If and when this is the case—depending on the crime at issue—deterrence would not justify the increased penalty of life without parole.

Similarly, estimating the deterrent effect of a given punishment is a speculative science at best. Given the longstanding debate over whether the death penalty deters crime *at all*,[158] an assessment that deterrence supports a

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[154] 130 S. Ct. 2011, 2029 (2010) ("But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide.").

[155] The concerns of specific deterrence, or deterring this offender from committing another crime against society, are largely addressed under the heading of incapacitation or future dangerousness.

[156] 1 JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., 1843). General deterrence can depend on a number of factors including:

> [T]he severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished; the target group's perceptions of the severity, swiftness, and certainty of punishment; the extent to which members of the target group suffer from addiction, mental illness, or other conditions which significantly diminish their capacity to obey the law; and the extent to which these would-be offenders face competing pressures or incentives to commit crime.

Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005).

[157] For instance, a sentence of life without parole for an aggravated murder can be justified by a need to deter others.

[158] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 307–08 (1972) (Stewart, J., concurring) (noting the "inconclusive empirical evidence" concerning deterrence).

life-without-parole sentence over a lesser one is a judgment that is imprecise and probably not empirically verifiable. In other words, deterrence does not, by itself, provide an insurmountable justification for a life-without-parole sentence in many cases.

With the problems in marginal deterrence, then, Eighth Amendment restrictions on life without parole in the context of a deterrence rationale would center on the ability of a lesser punishment in a given case to achieve the same deterrent effect. Thus, some life-without-parole sentences are not justified by deterrence given that they do not add any deterrent value.

3. *Rehabilitation and Life Without Parole*

As with the death penalty, rehabilitation is generally a moot concern when addressing life without parole. Life without parole, by definition, is a judgment that an individual cannot be rehabilitated.[159] As a result, the penological goal of rehabilitation does not justify a sentence of life without parole.

4. *Retribution and Life Without Parole*

The goal of retribution supports a punishment equal to the culpability of the offender and the harm caused.[160] This concept of *just deserts* demands that an offender receive exactly the amount of punishment he deserves for the crime committed, and receive no more or no less.[161] In terms of justifying a sentence of life without parole, then, the question would be whether a life-without-parole sentence for a given crime is a proportionate punishment given the offender's culpability and the harm caused.[162]

As with the other purposes of punishment, it is clear that in some cases, a penological goal of retribution may not be sufficient to justify a sentence of life without parole. First, while the theory of just deserts can successfully

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Compare Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005), *with* Carol S. Steiker, *No, Capital Punishment is not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

[159] *See* Appleton & Grøver, *supra* note 93, at 611.

[160] *See* Ashworth, *supra* note 144, at 84; Robinson, *supra* note 144, at 172.

[161] *See* VON HIRSCH & ASHWORTH, *supra* note 107, at 4.

[162] Note that the Eighth Amendment concept of proportionality is broader than this conception under just deserts as the "evolving standards of decency" approach clearly considers both retributive and utilitarian sentencing aims. *See generally* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) (describing this approach as "disjunctive" and contrary to the Eighth Amendment).

rank or grade various offenses,[163] the theory does not offer an ordinal assessment of what sentence a given crime may merit. Whether a certain crime merits a sentence of life without parole can therefore be a speculative exercise in some cases.

In particular, it is difficult to claim that retribution requires a sentence of life without parole in non-homicide cases.[164] Further, as the level of offender culpability and harm caused diminishes, there is a point at which one can no longer say that the offender's criminal conduct warrants a sentence of life without parole.[165]

Another significant problem with relying on retribution as the basis for a life-without-parole sentence is its reliance on a backward-looking assessment as the sole determinant of culpability. To the extent that time and post-offense conduct can mitigate the culpability of the offender, a retributive approach limits the ability to consider such issues when it makes a one-time assessment of culpability at sentencing and provides no opportunity to review that decision.

Given these limitations of retribution as a justification for a life-without-parole sentence, there are certainly some crimes that, particularly non-homicide crimes and/or non-violent crimes, may not be justifiable for Eighth Amendment purposes by the penological goal of retribution. Indeed, for crimes for which one cannot say life without parole is the offender's just desert, establishing a categorical Eighth Amendment rule to bar such sentences would not offend the penological purpose of retribution.

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[163] *See* VON HIRSCH & ASHWORTH, *supra* note 107, at 138.

[164] In homicide cases, a proportionate response for causing another's death could be the death penalty (an eye for an eye), so in such cases it would be difficult to say that a sentence of life without parole is disproportionate.

[165] Certainly this was the case in *Graham*, where the sentence seemed quite excessive compared to the offender's conduct. *See* Graham v. Florida, 130 S. Ct. 2011, 2033 (2010) ("The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a non-homicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit."); *id.* at 2040 (2010) (Roberts, J., concurring) ("Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections . . . and the state prosecutors . . . . No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.").

IV. RECONSIDERING THE EIGHTH AMENDMENT AND LIFE WITHOUT PAROLE

A. *Life Without Parole Warrants a New Standard*

When one considers the "different" nature of life without parole, the cursory manner in which such harsh sentences are often implemented, and the lack of a complete bar to regulation under any of the purposes of punishment, it is not difficult to reach the conclusion that life without parole warrants its own set of standards under the Eighth Amendment. In other words, given the potential for implementing such harsh and "different" sentences in cases where they are disproportionate to the crime committed, additional constitutional safeguards are needed in some cases to avoid excessive state sentences.[166]

In this vein, two important policy considerations are worth noting. First, to the extent that, under the Eighth Amendment, the Court establishes a categorical rule against the use of life without parole, as in *Graham*, such rules do not prevent States from imprisoning offenders for life. Instead, prohibiting life without parole merely requires that the State in some way revisit the question, *at some later date*, of whether the offender deserves to remain in prison.[167]

To expand the reach of the Eighth Amendment into this new area, then, does not necessarily result in the widespread release of individuals who have committed serious crimes. Instead, it mandates that states revisit the sentencing decisions in cases to protect against over-punishment of offenders.[168] It is certainly not far-fetched to believe that states could solve their well-documented problems with parole[169] by some vehicle other than life-without-parole sentences.

Second, providing a new category of Eighth Amendment review for life-without-parole cases also increases temporal accuracy in sentencing. Where a

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[166] Indeed, the reality in Florida supports this idea, with almost eighty juveniles serving life-without-parole sentences. *Graham*, 130 S. Ct. at 2024 (2010).

[167] Although one can surely play games with what might qualify as a meaningful opportunity for parole, this article for now will assume that some meaningful review of the sentence would be required at a later date. *See Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting).

[168] Given the large prison population in the United States and the increasing percentage of life without parole inmates, revisiting life sentences seems worth considering. *See* discussion *supra* Part III.A.

[169] Prior to the adoption of the federal sentencing guidelines and the existence of life without parole, many states had a problem with excessively lenient parole boards that often granted releases early in a prison sentence.

crime has been committed, it is often difficult to measure the character of the offender at the time of sentencing, much less make a judgment that the offender's character is such that his conduct warrants life in prison. Establishing categorical rules in certain areas would require states to review that determination over time, providing the opportunity to re-evaluate the initial decision.

B. *Three Possible Approaches for a New Standard*

1. *Life Without Parole and the "Evolving Standards of Decency"*

The most obvious approach to establishing a new category of Eighth Amendment review for life without parole is simply to expand the Court's "evolving standards of decency" jurisprudence. There are several appeals to this approach.

First, it would follow the path the Court has already established in *Graham*, in which the Court applied the evolving standards approach to non-homicide juvenile life-without-parole cases. Using the Court's explanation that the "evolving standards of decency" should apply in cases involving a particular "sentencing practice" that applies to a certain class of offenders, the Court could employ this approach to add other categorical prohibitions against life without parole.[170]

Second, the Court has a broader justification for applying the "evolving standards of decency" in non-capital cases, despite its *Harmelin* and *Ewing* line of cases. The Court's "evolving standards of decency" approach originated from a *non-capital* case, *Trop v. Dulles*.[171] In *Trop*, the Court held that the loss of citizenship as a punishment for desertion was a "cruel and unusual" punishment, forbidden by the Eighth Amendment.[172] The Court in *Trop*, following the earlier holding in *Weems*, explained that in determining whether a punishment was "cruel in its excessiveness and unusual in its character,"[173] the "meaning of such concepts is not precise, and that their scope is not static."[174] Nowhere does the Court in *Trop* imply that the interpretation of the Eighth Amendment's scope over time be limited to capital cases.[175]

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[170] *Graham*, 130 S. Ct. at 2022. For potential applications of a heightened standard, *see* discussion *infra* Part IV.C.

[171] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[172] *Id.* at 102–03.

[173] *Id.* at 100.

[174] *Id.* at 100–01.

[175] Indeed, early commentators recognized *Trop*'s predecessors, *Weems v. United*

Third, restrictions on life without parole can fit neatly within the Court's "death-is-different" jurisprudence if one characterizes life without parole as a death sentence, as it is a sentence to die in prison. Under this conceptualization, death is still different, but the concept of "death" is expanded to include both capital cases and life-without-parole sentences. Such an approach is plausible because, as explained above, life without parole maintains a close relationship with capital punishment and is often the outcome of capital cases.[176] Life without parole also, as explained above, shares many characteristics with the death penalty that no other sentence shares, and is qualitatively different than other sentences.

Nonetheless, there admittedly remain certain intellectual difficulties with using the "evolving standards of decency" approach to establish a category of new standards under the Eighth Amendment restricting the use of life without parole.[177] First, as the dissent in *Graham* emphasized, applying the "evolving standards of decency" to non-capital cases significantly departs from the Court's prior jurisprudence in both lines of cases.[178] In addition, with the growing use of life without parole, it may become more difficult to establish some "consensus" against its use.[179] Likewise, the Court may have to apply strained reasoning in a given context in bringing its own judgment to bear where one or more of the purposes of punishment can support the use of life without parole in a given context.[180]

States, 217 U.S. 349, 356–58 (1910) (reversing sentence of fifteen years hard labor and civil disabilities for falsifying a public document), and *O'Neil v. Vermont*, 144 U.S. 323, 337–40 (1892) (Field, J., dissenting) (dissenting from denial of certiorari in challenge to sentence of fifty-four years for unauthorized sale of liquor), as relevant precedent in Eighth Amendment cases. *See, e.g.*, Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 842–43 (1969); Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074 n.12, 1075 (1964).

[176] Steiker & Steiker, *supra* note 120, at 158 ("[I]t may well be that the widespread adoption of [life without parole] . . . has significantly increased the sentences of the many in order to make less likely the already unlikely execution of the few.").

[177] I have highlighted my own difficulties with the evolving standards approach. *See generally* Berry, *supra* note 23.

[178] *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting).

[179] This, of course, still may be possible to demonstrate in a given context.

[180] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 371 (2002) (Scalia, J., dissenting); Roper v. Simmons, 543 U.S. 551, 621 (2005) (Scalia, J., dissenting).

2. *Life Without Parole and a Purposive Application of the Eighth Amendment*

The Court, however, need not apply the "evolving standards of decency" in non-capital cases in order to establish a new Eighth Amendment standard for life-without-parole cases. Following the Court's application of the Bill of Rights, as incorporated to apply to the states, in a number of other contexts,[181] the Court could apply a "purposive test of constitutionality" in applying the Eighth Amendment in the life without parole context.[182] First proposed in 1970 by Supreme Court Justice Arthur Goldberg and Harvard Law Professor Alan Dershowitz, the purposive test of Eighth Amendment interpretation seeks to protect "[t]he basic concept underlying the Eighth Amendment," which "is nothing less than the dignity of man," by condemning excessively severe punishments.[183]

Prior to 1970, the Supreme Court had, in order to protect these values, interpreted the cruel and unusual punishment clause to prohibit punishments that were "degrading in their severity" and "wantonly imposed."[184] Thus, when a punishment is demonstrated to be degrading in severity (cruel) and wantonly imposed (unusual), the state has the burden, under the purposive test, to demonstrate that the punishment is not excessively severe.[185] Accordingly, under the purposive test, a state's punishment should be declared excessively severe and thus unconstitutional if "(a) it produces hardship disproportionately greater than the harm it seeks to prevent, or (b) a less severe punishment could as effectively achieve the permissible ends of punishment."[186]

In many cases, a life-without-parole sentence would fall under both of these categories. Often, a life-without-parole sentence produces a hardship for the offender that is disproportionately greater than the harm it seeks to prevent.[187] As explained above, the deterrence value of life-without-parole

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[181] Such an approach has been applied in First Amendment free speech and free exercise of religion cases, and Fifth and Fourteenth Amendment due process cases. *See* Berry, *supra* note 23, at 17–24; Arthur Goldberg & Alan Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1786 (1970).

[182] *See* Goldberg & Dershowitz, *supra* note 181, at 1784.

[183] *Id.* (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).

[184] *Id.*

[185] *See* Berry, *supra* note 23, at 17–24.

[186] Goldberg & Dershowitz, *supra* note 181, at 1794; Rudolph v. Alabama, 375 U.S. 889, 890–91 (1963) (Goldberg, J., dissenting) (suggesting this approach in his dissent to denial of certiorari).

[187] *See generally* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals,*

sentences in some cases is marginal, while the hardship of a life-without-parole sentence can be vastly more significant.

Likewise, in many cases, a punishment less severe than life without parole could effectively achieve the permissible ends of punishment in a given case. For instance, as explained above, in many cases a theory of just deserts does not require a life sentence without parole. Similarly, a less severe punishment could likewise deter and serve the goal of incapacitation in many cases.

The value, then, of this approach would be a requirement that the state justify its use of harsh punishment to avoid categorical exclusions for life without parole. As a result, the imposition of life-without-parole sentences would be carefully considered as a systemic matter, and minimize disproportionate non-capital sentences.

Further, the purposive approach has the added value of avoiding the "evolving standards of decency" approach, requiring no objective consensus counting or subjective justice judgment.[188] Instead, the Court would have a more principled (and perhaps more widely accepted) approach to delineating the reach of the Eighth Amendment.[189]

3. *Life Without Parole and Heightened Proportionality*

Even if one does not apply the "evolving standards of decency" or the purposive approaches to life without parole, life-without-parole sentences nonetheless merit their own category of heightened Eighth Amendment scrutiny. As explained above, the punishment of life without parole is fundamentally "different" than all other non-capital offenses.[190] In addition, as the Court's jurisprudence has demonstrated, the "narrow proportionality" approach offers no significant review of sentences. In both *Harmelin* and *Ewing*, then, the Court demonstrated its reluctance to find a sentence excessive even under "disproportionate" circumstances.[191]

Rather than the "narrow proportionality" approach that presumes a sentence is acceptable under the Eighth Amendment, an "intermediate" proportionality standard could be applied in life-without-parole cases. In

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and the Eighth Amendment: "Proportionality" Relative to What?, 89 MINN. L. REV. 571 (2005).

[188] *See* Berry, *supra* note 23, at 17–24.

[189] *Id.*

[190] *See* discussion *supra* Part III.A.1.

[191] Indeed, a sentence of life without parole for stealing golf clubs appears particularly harsh. Ewing v. California, 538 U.S. 11, 30–31 (2003); *see also* Harmelin v. Michigan, 501 U.S. 957, 960 (1991).

other words, the Court could make a more complete review in life-without-parole cases to ensure that excessive sentences can be adequately challenged. The standard could be a simple inquiry concerning the excessiveness or the disproportionality of the sentence as related to the crime. Rather than a standard of "gross disproportionality," an intermediate standard would simply require a showing that the sentence was excessive as compared to the crime.[192] The Court could use such a standard as a categorical matter or on a case-by-case basis as Chief Justice Roberts's opinion advocates in *Graham* (albeit for the "narrow proportionality" standard).[193]

This approach could provide clarity to the large number of challenges that are sure to arise after *Graham*.[194] As with many other areas of constitutional law, the federal courts could develop a common constitutional law to delineate which life-without-parole sentences are excessive and which are acceptable.[195] Perhaps most importantly, such an approach would result in serious review and consideration of the decision to sentence an individual to life without parole and move the criminal justice system away from the much-criticized two track approach that has developed from the Court's death-is-different jurisprudence.[196]

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[192] *See supra* note 67 (describing the Court's line of "gross disproportionality" cases).

[193] Graham v. Florida, 130 S. Ct. 2011, 2042 (2010) (Roberts, C.J., concurring). In advocating for a case-by-case approach, Chief Justice Roberts argued:

> Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality review is premised on the "justified" assumption that "courts are competent to judge the gravity of an offense, at least on a relative scale." 463 U.S. at 292. Indeed, "courts traditionally have made these judgments" by applying "generally accepted criteria" to analyze "the harm caused or threatened to the victim or society, and the culpability of the offender."

Id. at 2042 (citations omitted).

[194] *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting). Justice Thomas anticipates a flood of litigation:

> Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line drawing problems to which courts must seek answers beyond the strictures of the Constitution . . . The Court provides no answers to these questions, which will no doubt embroil the courts for years.

Id.

[195] *See, e.g.*, Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 98 (1999) (advocating that federal judges take a larger role in developing sentencing law).

[196] *See, e.g.*, Barkow, *supra* note 2, at 1205. *See generally* Berman, *supra* note 8.

C. *Exploring Possible Applications of a Heightened Life Without Parole Standard*

Regardless of the method adopted to accord life without parole a heightened Eighth Amendment standard, the question remains as to how such a standard might be applied. In other words, what other categorical Eighth Amendment limitations should be established for life without parole? This final section examines the justifications for establishing some of the possible categorical exclusions and assesses the strength of each potential limitation.

1. *Limitations Based on the Nature of the Offense*

a. *Non-Violent Offenders*

As with capital punishment, it makes sense to consider potential Eighth Amendment limitations based on the nature of the offense. The easiest of these potential limitations to justify would be a prohibition against the use of life without parole for non-violent crimes.

The argument for an Eighth Amendment prohibition against life-without-parole sentences for non-violent crimes could be made first on the ground that none of the purposes of punishment affirmatively support or justify such a sentence. Retribution for non-violent crimes does not demand a sentence of life without parole as an offender's just deserts. Deterrence, to the extent it can be established, may not be more than marginally significant when compared to a life sentence. Finally, the potential future dangerousness of a non-violent offender is never such that it cannot warrant revisiting at a later date.

Further, non-violent offenders that receive life without parole often receive such sentences as part of recidivist sentencing schemes such as state three strikes laws[197] or the federal sentencing guidelines.[198] Because such

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[197] California, Washington, Louisiana, and Virginia have "three strikes" laws that impose a life-without-parole sentence for a third felony offense. *See* Appleton & Grøver, *supra* note 93, at 599; Trevor Jones & Tim Newburn, *Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics*, 46 BRIT. J. CRIMINOLOGY 781, 783–87 (2006).

[198] While the sentencing guidelines are no longer mandatory, federal judges still apply them in a majority of cases. *See* U.S. v. Sexton, 512 F.3d 326, 333 (6th Cir. 2008) (Merritt, J., dissenting) ("This case is one more example of the continuing problem, the problem of guidelineism, or 'guidelinitis,' the inability of most federal courts to break their habit of mechanically relying just on the guidelines alone."). *See generally* UNITED STATES SENTENCING COMMISSION: QUARTERLY SENTENCING UPDATE, *available at* http://www.ussc.gov/linktojp.htm (showing post-*Booker* statistics).

sentences are based on systemic predictions of the character of the offender, there exists a greater possibility of injustice in a given case.[199] As a result, it makes sense to require states or the federal government, at the very least, to allow for the possibility that individuals will change over time, and at some point, be able to rejoin society.[200]

b. *Non-Homicide Cases*

A second category of potential Eighth Amendment cases would follow the same line that the Court drew in *Graham*, but apply it to all offenders. Although certainly a more difficult case than non-violent offenders, a punishment of life without parole in a non-homicide case could arguably violate the Eighth Amendment. A large number of non-homicide cases do not involve the same level of offender culpability proportionate to a sentence of life without parole. In addition, as above, the purposes of punishment do not clearly require a sentence of life without parole for virtually all non-homicide crimes, although the arguments are certainly weaker for non-homicide crimes than non-violent crimes.

The crimes that present the best case against an Eighth Amendment categorical exclusion for non-homicide cases are aggravated sexual assaults, such as the ones described by Chief Justice Roberts in his concurring opinion in *Graham*.[201] Even in these cases, however, there seems little harm in prohibiting life-without-parole sentences such that the State must re-examine the offender at a later date. As mentioned above, prohibiting life without parole does not prohibit a life of imprisonment. It simply protects against excessive punishment by allowing a parole board or similar entity to revisit the punishment of the offender at a later date.

c. *Felony Murder Accomplices*

A third possible category of Eighth Amendment exclusion would be one that the Court has adopted in the capital context: accomplices to felony

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[199] Roper v. Simmons, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

[200] Frase, *supra* note 187, at 639 (observing that when past and probable future crimes are minor, a recidivist statute's mandatory life without parole "seems likely to be far more costly in human terms than the crimes it will prevent through deterrence and incapacitation").

[201] Graham v. Florida, 130 S. Ct. 2011, 2041 (2010) (Roberts, C.J., concurring).

murder who do not participate in the killing and demonstrate no intent to kill. First articulated in *Enmund v. Florida*, this categorical rule prevents the excessive punishment of the comparatively "innocent" bystander.[202]

A sentence of life without parole can be equally harsh to an individual who participated in a crime with individuals who suddenly decide to kill others.[203] Often such individuals are "along for the ride" and/or in the wrong place at the wrong time.[204] As a result, it makes sense to prohibit a final judgment that that individual deserves to spend the rest of his life in prison, rather than reserve that judgment for a later date.

In some ways such an exception would be analogous to the juvenile offender exception in that it is based on a judgment that a particular individual is somehow less culpable based on his role in the criminal offense.[205] A categorical rule prohibiting life-without-parole sentences for non-participatory felony murder accomplices would prevent courts and juries from over-punishing one individual based on the conduct of others.

2. *Limitations Based on Offender Characteristics*

In addition to the limitations based on the characteristics of the offense, there are several potential limitations based on offender characteristics. The most obvious of these limitations would be to broaden the prohibition against juvenile life-without-parole sentences in non-homicide cases to prohibit juvenile life-without-parole sentences altogether.[206] The argument here would be largely the same one the Court used in *Graham*.[207] Given the age and inexperience of juveniles, it makes sense to wait to make a final

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[202] Enmund v. Florida, 458 U.S. 782, 801 (1982); *see also* Tison v. Arizona, 481 U.S. 137, 147 (1987).

[203] *See, e.g.*, Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. PA. L. REV. 1049, 1062–66 (2008) (arguing for the categorical exclusion of felony murder charges against juveniles because of the likelihood of life-without-parole sentences).

[204] Rudolph J. Gerber, *Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 778 (1999) (discussing the need for proportioned sentences comparable to the culpability of the individual).

[205] *Id.* at 764 (noting that defendants in the case mentioned "were mostly victims of bad luck").

[206] Although the Court did not seem ready to do this in *Graham*, it certainly did not foreclose the possibility. *See supra* note 81; *see also* Connie De La Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. REV. 983, 988 (2008) (advocating that juvenile life without parole be completely abolished in the United States).

[207] Graham v. Florida, 130 S. Ct. 2011, 2029–30 (2010)

judgment that such individuals can never rejoin society.[208] In other words, although such individuals may end up spending life in prison, given the possibility for personal growth and change over the course of a lifetime, it is logical to reserve final judgment to a later date.[209]

An intermediate category, as suggested above, could be the prohibition of juvenile life-without-parole sentences for non-violent crimes. Such an intermediate approach may be more viable given the desire to imprison aggravated murderers to a sentence of death or at least life without parole.[210]

3. *Case-by-Case Limitations*

In addition to the foregoing categorical approaches, the Court should also consider applying the Eighth Amendment, per Chief Justice Roberts' concurrence, on a case-by-case basis for life-without-parole cases under one of the heightened standards previously outlined.[211] Reserving such an approach is important to prevent injustice in a given case. No matter how well one creates categorical rules, the presence or absence of such rules is likely to result in bad outcomes at the margins. The advantage of a case-by-case approach, then, would be to create good results without creating bad law. Certainly, the Court should not foreclose detailed review of life-without-parole cases by applying its narrow proportionality rule in all non-juvenile cases.[212]

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[208] *See* Brief for Sentencing Project as Amici Curiae Supporting Petitioners at 9, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412 & 08-7621) ("Precisely because the adolescent brain is not yet fully developed, juveniles possess character traits that are more transitory than those of adults and, accordingly, are more likely to change as they mature.").

[209] *See* Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) ("[I]t is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.").

[210] One example of this would be John Lee Malvo, who was convicted and sentenced to six life-without-parole terms for his role in the 2002 sniper attacks in the Washington D.C. metro area. Times Topics: People, *Lee Boyd Malvo*, N.Y. TIMES (Nov. 11, 2009), http://topics.nytimes.com/top/reference/timestopics/people/m/john_lee_malvo/index.html.

[211] *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring).

[212] The disadvantage would be the increased number of cases the Court would have to decide in developing a "common law" of Eighth Amendment applications to life without parole. On the other hand, given the Court's meager caseload (less than one hundred cases a year), such an approach could be feasible.

V. CONCLUSION

This Article has aimed to achieve several purposes. First, the Article has sought to outline the Supreme Court's Eighth Amendment death-is-different jurisprudence and explain the Court's application of the two lines of cases in *Graham v. Florida*. Second, the Article has attempted to make the case for a new Eighth Amendment standard of review for life without parole, given the ways in which life without parole is "different." Finally, the Article has offered three possible approaches to developing a heightened standard of review for life without parole under the Eighth Amendment and suggested several possible applications of such standards.

Thus, as in the aftermath of *Graham* many challenges to the application and scope of the Eighth Amendment are sure to arise, this Article has endeavored to provide an initial road map in thinking through one new way of conceptualizing the Eighth Amendment.